2021 Faculty Accomplishments
Celebration & Toast

Journal Articles

School of Law
University of Richmond
CONSTITUTIONAL RIGHTS BEFORE REALISM

Jud Campbell*

This Essay excavates a forgotten way of thinking about the relationship between state and federal constitutional rights that was prevalent from the Founding through the early twentieth century. Prior to the ascendancy of legal realism, American jurists understood most fundamental rights as a species of general law that applied across jurisdictional lines, regardless of whether these rights were constitutionally enumerated. And like other forms of general law, state and federal courts shared responsibility for interpreting and enforcing these rights. Nor did the Fourteenth Amendment initially disrupt this paradigm in ways that we might expect. Rather than viewing rights secured by the Fourteenth Amendment as distinctively “national,” most early interpreters thought that these rights remained a species of general law. For several decades, debates instead focused on the extent to which these rights were enforceable in federal court, akin to the way that federal courts could hear general-law claims in diversity-jurisdiction cases. It was only with the rise of legal realism that American jurists began to conceptualize fundamental rights distinctively in terms of state (constitutional) law and federal (constitutional) law and to divide interpretive authority into state and federal spheres.

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How do rights secured by state constitutions relate to those secured by the Fourteenth Amendment? For instance, do state-level guarantees of religious and expressive freedoms have the same legal content as the “incorporated” federal rights supplied by the First Amendment?1 Some state courts say yes. But this

* Associate Professor, University of Richmond School of Law. The author thanks Danny Zemel and Nathaniel Obinwa for their research assistance and the participants in this symposium for helpful comments.
NATURAL RIGHTS, POSITIVE RIGHTS, AND THE RIGHT TO KEEP AND BEAR ARMS

JUD CAMPBELL*

INTRODUCTION

Speaking to Congress in 1789, James Madison defended his proposed bill of rights as a list of “simple acknowledged principles,” and not ones of “a doubtful nature.”1 And true to form, his inclusion of a right to keep and bear arms received little debate at the time.2 By the mid-nineteenth century, however, judicial interpretations of that right were in disarray. Some judges interpreted the right based on its ostensible purpose of preserving the independence and effectiveness of militias. Others ruled that governmental power extended only to imposing modest restraints on personal firearms—not outright bans. Still more held that all weapons regulations were unconstitutional. So why had Madison’s “simple” declaration of the right to keep and bear arms become so hard to interpret?

One possibility is a lack of any genuine original consensus.3 Another is that Americans were changing their views. Saul Cornell, for instance, argues that by the mid-nineteenth century an individualistic conception of the right to keep and bear arms had begun to supplant the former linkage between that right and civic obligations, like militia service.4 Meanwhile, Robert Leider treats Antebellum decisions as largely just tracking public opinion, with judges essentially making up doctrine as they went along.5 This Article embraces elements of each of these stories. But it argues that right-to-bear-arms cases also reflected the complicated

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This Article is also available online at http://lcp.law.duke.edu/.
* Associate Professor, University of Richmond School of Law. The author thanks the participants in this symposium and Nathan Chapman for helpful comments.
4. See SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 139 (2008) (stating that, during the Jacksonian era, the “new culture of individualism had a profound impact on legal thinking about the right to bear arms, the militia, and the idea of self-defense”).
READYING VIRGINIA FOR REDISTRICTING AFTER A DECADE OF ELECTION LAW UPHEAVAL

Henry L. Chambers, Jr. *

INTRODUCTION

Until Virginians approved Constitutional Amendment 1 in November 2020, the Virginia Constitution required the General Assembly to redraw Virginia's state legislative and congressional electoral districts every ten years in the wake of the national census.1 Redistricting culminated in the adoption of legislation redefining those districts.2 If the redistricting process had worked as intended after the 2010 census, electoral districts would have been redrawn and adopted by the General Assembly in 2011, approved by the Governor, and used for the ensuing decade.3 The redistricting process did not work as the Virginia Constitution contemplated. The General Assembly redrew, and the Governor approved, state Senate and House of Delegates districts in 2011.4 The state Senate districts remained substantially unchanged during the 2010s. Conversely, pursuant to litigation, a court-appointed special master

* Professor of Law, University of Richmond School of Law. The author thanks Joleen Traynor and Zanas Talley for their research assistance.


3. See VA. CONST. art. II, § 6 (“The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.”).

Convergence and Conflation in Online Copyright

Christopher A. Cotropia* & James Gibson**

ABSTRACT: The Digital Millennium Copyright Act (“DMCA”) is showing its age. Enacted in 1998, the DMCA succeeded in its initial goal of bringing clarity to wildly inconsistent judicial standards for online copyright infringement. But as time has passed, the Act has been overtaken—not by developments in technology, but by developments in copyright’s case law. Those cases are no longer as divergent as they were in the last millennium. Instead, over time the judicial standards and the statutory standards have converged, to the point where the differences between them are few. The statute whose ascendance was once central to the governance of copyright online is therefore now diminished in importance.

At first glance, this development seems unproblematic. After all, uniformity was the DMCA’s goal, and convergence gets us closer to it. But a deeper look reveals that convergence has significantly changed the cost/benefit calculus for those whom the Act governs. The benefits of complying with the Act’s regulatory requirements have decreased, because convergence means that one can ignore the statute and rely solely on the case law. And the costs of complying have increased, because convergence has paradoxically given rise to a new, troubling phenomenon: the mixing and matching of statutory and judicial standards in unpredictable and counterproductive ways, which create new, unintended forms of copyright liability and immunity. In short, convergence has led to conflation, which means that the best course for today’s online community is to steer clear of the DMCA altogether.

* Dennis I. Belcher Professor of Law and Director of the Intellectual Property Institute, University of Richmond School of Law. The authors would like to acknowledge the considerable help they received from Shyam Balgariesh, Sandra Braman, AnneMarie Bridy, Dan Burk, Jud Campbell, Hank Chambers, Erin Collins, Kenny Crews, Graeme Dinwoodie, Stacey Dogan, Jessica Erickson, Dave Fagundes, Linda Fairtile, Joe Fishman, Jeanne Fromer, Kristelia Garcia, Lolly Gasaway, Cathy Gellis, Deborah Gerhardt, Andrew Gilden, Eric Goldman, Laura Heymann, Justin Hughes, Dmitry Karshkedt, Daphne Keller, Doug Lichtman, Lucretia McCulley, Tyler Ochoa, Jack Preis, Jennifer Rothman, Noah Sachs, Matt Sag, Jessica Silbey, Shannon Sinclair, Scott Tilghman, Rebecca Tushnet, Rob Tyler, Fred Yen, and Peter Yu. They would also like to thank Brad Stringfellow for his excellent research assistance.

** Sesquicentennial Professor of Law, University of Richmond School of Law. In addition to those acknowledged above, Jim would like to thank Jane Savoca, his safe harbor from all storms.
THE HIDDEN VALUE OF ABANDONED APPLICATIONS TO THE PATENT SYSTEM

CHRISTOPHER A. COTROPIA
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continued
The Lost Lessons of Shareholder Derivative Suits

Jessica Erickson*

Abstract

Merger litigation has changed dramatically. Today, nearly every announcement of a significant merger sparks litigation, and these cases look quite different from merger cases in the past. These cases are now filed primarily outside of Delaware, they typically settle without shareholders receiving any financial consideration, and corporate boards now have far more ex ante power to shape these cases. Although these changes are often heralded as unprecedented, they are not. Over the past several decades, derivative suits experienced many of the same changes. This Article explores the similarities between the recent changes in merger litigation and the longer history of derivative suits. The trajectories of these lawsuits are not identical, but they nonetheless suggest larger lessons about shareholder litigation, including the predictable ways in which agency costs play out in the courtroom and at the settlement table. By uncovering the lost lessons of derivative suits, corporate law can finally tackle the deeper issues facing shareholder litigation.

* Professor, University of Richmond School of Law. B.A., Amherst College; J.D., Harvard Law School. This paper benefitted from comments received at Oceans Apart: Corporate and Securities Litigation and Regulation in Comparative Perspective and the National Business Law Scholars' Conference.
In this article, we study attorney fees awarded in the largest securities class actions: “mega-settlements.” Consistent with prior work, we find larger fee awards but lower percentages in these cases. We also find that courts are more likely to reject or modify fee requests made in connection with the largest settlements. We conjecture that this scrutiny provides an incentive for law firms to bill more hours, not to advance the case, but to help justify large fee awards—“make work.” The results of our empirical tests are consistent with plaintiffs’ attorneys investing more time in litigation against larger companies, with the largest potential damages, particularly when there are multiple lead counsel firms. We find a similar pattern with relative efficiency, with more hours per docket entry for the largest-stake cases with multiple lead counsel firms. Overall, our results suggest that plaintiffs’ attorneys are receiving windfall fee awards in at least some mega-settlement cases at shareholders’ expense.

I. Introduction

The role of plaintiffs’ attorneys in securities fraud class actions has been controversial for decades, with the relationship between plaintiffs’ attorneys and class representatives raising the most fraught questions. Class counsel typically have a much greater interest in the outcome of the case—in the form of the fee award by the court if the litigation produces a settlement for the class—than the representative plaintiff, who typically will receive only a small percentage of any settlement. Because fee awards are typically taken out of the settlement amount, class counsel and class members have potentially
Convergence and Conflation in Online Copyright

Christopher A. Cotropia* & James Gibson**

ABSTRACT: The Digital Millennium Copyright Act (“DMCA”) is showing its age. Enacted in 1998, the DMCA succeeded in its initial goal of bringing clarity to wildly inconsistent judicial standards for online copyright infringement. But as time has passed, the Act has been overtaken—not by developments in technology, but by developments in copyright’s case law. Those cases are no longer as divergent as they were in the last millennium. Instead, over time the judicial standards and the statutory standards have converged, to the point where the differences between them are few. The statute whose ascendance was once central to the governance of copyright online is therefore now diminished in importance.

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* Dennis I. Belcher Professor of Law and Director of the Intellectual Property Institute, University of Richmond School of Law. The authors would like to acknowledge the considerable help they received from Shyam Balganesh, Sandra Braman, AnneMarie Bridy, Dan Burk, Jud Campbell, Hank Chambers, Erin Collins, Kenny Crews, Graeme Dinwoodie, Stacey Dogan, Jessica Erickson, Dave Fagundes, Linda Fairtile, Joe Fishman, Jeanne Fromer, Kristelia Garcia, Lolly Gasaway, Cathy Gellis, Deborah Gerhardt, Andrew Gilden, Eric Goldman, Laura Heymann, Justin Hughes, Dmitry Karshiedt, Daphne Keller, Doug Lichtman, Lucretia McCulley, Tyler Ochoa, Jack Preis, Jennifer Rothman, Noah Sachs, Matt Sag, Jessica Silbey, Shannon Sinclair, Scott Tilghman, Rebecca Tushnet, Rob Tyler, Fred Yen, and Peter Yu. They would also like to thank Brad Stringfellow for his excellent research assistance.

** Sesquicentennial Professor of Law, University of Richmond School of Law. In addition to those acknowledged above, Jim would like to thank Jane Savoca, his safe harbor from all storms.
When the Intellectual Property Redux conference was first announced two or so years ago, I remember having both a positive and negative reaction. The positive reaction was, “Wow, what a great idea for a conference.” The negative reaction was, “Oh man, why didn’t I think of it first?” But now that I have been included, all negative thoughts have washed away.

* Professor of Law and Austin Owen Research Scholar, University of Richmond School of Law. I would like to thank Ann Bartow for including me in the Intellectual Property Redux conference, Corinna Lain for editing this essay (and just about everything else I’ve ever written), and Jane Savoca for being my own Fortuna Redux.
Reforming International Investment Arbitration: an Introduction

Chiara Giorgetti  
University of Richmond  
cgiorteg@richmond.edu

Laura Létourneau-Tremblay  
Pluricourts, University of Oslo  
laura.letourneau-tremblay@jus.uio.no

Daniel Behn  
Queen Mary University of London School of Law  
d.behn@qmul.ac.uk

Malcolm Langford  
Department for Public and International Law, University of Oslo  
malcolm.langford@jus.uio.no

For over a decade, investor-state dispute settlement (ISDS) has suffered a so-called legitimacy crisis. Critics have argued that ISDS is pro-investor, biased against developing countries, beset by incoherent jurisprudence and plagued by a lack of transparency and excessive costs and compensation. While the

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WITH GRATITUDE FROM OUR DAUGHTERS: REFLECTING ON JUSTICE GINSBURG AND UNITED STATES V. VIRGINIA

Meredith Johnson Harbach *

“You may be whatever you resolve to be.”

—Inscription over the entrance to the Barracks at the Virginia Military Institute

INTRODUCTION

“What enabled me to take part in the effort to free our daughters and sons to achieve whatever their talents equipped them to accomplish, with no artificial barriers blocking their way?”

—Ruth Bader Ginsburg

On September 18, 2020, we mourned the loss of Justice Ruth Bader Ginsburg, whom many considered not just a cultural icon,

* Professor of Law, University of Richmond School of Law. I thank the editors of the University of Richmond Law Review, especially Annual Survey Editor Jamie Wood, for the invitation and opportunity to write this In Memoriam Essay. It has been an honor and a joy to work on this piece. Gemma Fearn provided fantastic—and fast!—research for this project. This Essay is dedicated to my daughters.

1. Stonewall Jackson FAQ, VA. MIL. INST., https://www.vmi.edu/archives/stonewall-jackson-resources/stonewall-jackson-faq/ [https://perma.cc/GN8K-EENQ]. This quote, found in a notebook kept by Stonewall Jackson while attending West Point, is attributed to Reverend Joe Hawls in Letters to Young Men, on the Formation of Character. Id. Jackson, a former faculty member at VMI and Confederate general, has long been a controversial symbol at VMI. Just before this Essay went to print, the VMI Board of Visitors voted unanimously to remove Stonewall Jackson’s statue from the campus. For more on recent events at VMI, see infra note 213.

2. RUTH BADER GINSBURG WITH MARY HARTNETT & WENDY W. WILLIAMS, MY OWN WORDS, at xiv (2016) [hereinafter GINSBURG, MY OWN WORDS].
The Aftermath of *Janus v. AFSCME*: An Ongoing Assault on Public Sector Unions

Ann C. Hodges

In June 2018, the Supreme Court issued its opinion in *Janus v. AFSCME*,\(^1\) reversing decades old precedent and holding that agency fee agreements in the public sector violate the First Amendment. Even before the decision came down, the same organizations that mounted the constitutional challenges against agency fees began to file lawsuits seeking return of agency fees paid prior to the decision. Multiple cases are winding their way through the courts in a number of states, with appellate decisions just beginning to issue. Although major drops in union membership and funding post-*Janus* have not occurred thus far,\(^2\) these repayment cases are a significant drain on union resources.

This Issue Brief will analyze the post-*Janus* cases, beginning with a short description of the history leading up to *Janus*, along with the Supreme Court’s decision in *Janus*. The Issue Brief will then examine the organizations that are bringing these cases before moving to an analysis of the cases themselves, including the arguments of the plaintiffs and defendants and the outcomes of those cases that have been decided thus far. This portion of the Issue Brief will concentrate on the Seventh Circuit’s decision on remand in *Janus II*, as the first decision from a court of appeals and one that is representative of the arguments presented and decisions reached. The primary focus of the Issue Brief will be on the cases seeking restitution of agency fees collected under state laws pre-*Janus*. Before concluding, however, the Issue Brief will describe some additional cases that union opponents have brought against public sector unions after *Janus*. In conclusion, the Issue Brief will pose some important questions raised by this litigation.

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2 Rebecca Rainey & Ian Kullgren, *One Year After Janus, Unions are Flush*, POLITICO (May 17, 2019) (describing the impact of organizing, budget cuts, staff reductions, and new legislation in mitigating the impact of the loss of agency fees).
Research in the Age of Coronavirus

by Joyce Manna Janto

The current pandemic has upended our lives. Lawyers are working from home, losing access to their law libraries. Even if they had access to the library, some publishers suspended shipments so material might not be updated. Lawyers who used print in lieu of expensive online services have had to find alternatives. The need for free online legal resources has never been more pressing. Fortunately, in Virginia, this isn't difficult. All three branches of government in the Commonwealth have a robust internet presence.

Executive orders and directives issued by Governor Northam can be found on his official webpage. Material from former governors is archived but still available online. Not only are the opinions of the Attorney General from 1996 to the present accessible, but the Annual Reports of the Attorney General from 1883 to the present are online.

If you are unsure if an administrative agency has a website you can check with Virginia.gov. It provides a list of agencies with a link to the agency's official website. These websites provide contact information, news releases, and other documents. Many of these websites will provide relevant regulations and agency decisions. The Virginia Register of Regulations as well as the Virginia Administrative Code are available online. Not only is the current issue of the Register available, the archive contains every issue published. Both the Register and the Administrative Code are fully searchable.

There are several options to track legislation. The Division of Legislative Services (DLS) website and the Legislative Information System (LIS) have a wealth of material. One can find information about the General Assembly and all of the legislative action from the past session under the “Publications” link.

The archive of bills contains all enrolled bills from 1995 to the present. One little known but useful document on these sites is In Due Course: Changes to Virginia’s Laws. It lists changes to the Code of Virginia scheduled to take effect in July of each year. Aside from the DLS and LIS websites, there are other free sources to track Virginia legislation. LegisScan, and Richmond Sunlight are two of the best. LegisScan permits tracking of legislation from previous sessions. If you are interested in Virginia politics in general, Vapap is a good source. The Virginia Red Book provides a “Who’s Who” of Virginia politics.

The official version of the Virginia Code is online, but the annotations aren’t. The annotations are copyrighted by LexisNexis, the company that publishes the official code under contract to the state. Overall, the availability of Virginia case law from official sources is limited. The Virginia Supreme Court and Court of Appeals post opinions, orders, and rules on their websites. Circuit Court materials vary by jurisdiction. Case law is readily accessible through Fastcase. Many lawyers forget they have free access to Fastcase by virtue of their VSB membership. Some may dismiss the “free” service, feeling that it couldn’t compare to Lexis or Westlaw since “you get what you pay for.” They forget that Fastcase isn’t really free, it’s paid for out of bar dues.

If you haven’t logged into Fastcase in a while you may be surprised. Fastcase has a wide array of Virginia sources. As expected, it provides the code, regulations, and the opinions of the both the Supreme and Court of Appeals. It also has circuit court decisions, access to certain dockets, and ethics materials. Authority Check provides the status of cases and statutes. A search in the code or case databases will also retrieve suggested secondary content related to your search. Fastcase has licensing agreements with several publishers including the ABA, James Publishing, and HeinOnline. Fastcase isn’t limited to Virginia materials. It provides access to other states and federal cases, statutes, rules and regulations. The system also has decisions from selected federal administrative agencies. The search engine in Fastcase is comparable to those of Lexis and Westlaw. It supports Boolean as well as natural language searching and allows post-filtering of results.

Alumni of the University of Richmond School of Law have an additional avenue for free legal information. By registering with the Alumni Office alumni have access to HeinOnline. This database is a collection of many prominent legal journals and law reviews, available in PDF. It also includes foreign and international law resources, the Congressional Record and other congressional publications, the Federal Register, C.F.R., federal legislative histories, and the U.S. Presidential Papers.

Endnotes

1 www.governor.virginia.gov/executive-actions/

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Joyce Manna Janto is the Deputy Director of the University of Richmond Law School Library. She has a law degree from the University of Richmond and a Master of Library Science degree from the University of Pittsburgh. She teaches Legal Research, Advanced Legal Research, Virginia Legal Research, and Professional Responsibility. Janto is also the editor of “Guide to Legal Research in Virginia.”
In his engaging and provocative new book, The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland, David S. Schwartz challenges McCulloch’s canonical status as a foundation stone in the building of American constitutional law. According to Schwartz, the fortunes of McCulloch ebbed and flowed depending on the politics of the day and the ideological commitments of Supreme Court justices. Judicial reliance on the case might disappear for a generation only to suddenly reappear in the next. If McCulloch v. Maryland enjoys pride of place in contemporary courses on constitutional law, Schwartz argues, then this is due more to personalities and institutions of the early twentieth century than it is to any deeply rooted historical consensus about the importance of Marshall’s opinion. Nor, Schwartz insists, should we read Marshall’s opinion on the Second Bank of the United States as embracing a theory of “aggressive nationalism” and the unlimited expansion of implied congressional power. That might be a correct reading of the Constitution (Schwartz is never completely clear on this particular point), but Marshall himself muddied the issue with ambiguous language—language that left the door open to later more restrictive interpretations of federal power. The fact that scholars and judges continue to treat McCulloch as a foundational statement of constitutional power reflects a triumph of twentieth century mythology—a triumph triply problematic in that it (1) is historically misleading, (2) does not embrace a fully robust understanding of implied federal power (which Schwartz presumably prefers), and (3) relies upon the same history-centric values as “conservative originalism” (which Schwartz presumably rejects).

In short, Schwartz comes not to praise the mythological McCulloch, but to bury it. Readers who complete this deep dive into two hundred years of cultural and judicial references to McCulloch will probably be persuaded by Schwartz’s general arguments: McCulloch does contain ambiguous and at times seemingly contradictory language, Marshall’s opinion has been
I am delighted to have participated in the Second Annual Intellectual Property Redux Conference and to publish this essay. I rarely look back at my older articles, but in Fall 2018 I was asked to give a keynote address at a conference held by the Biotechnology Innovation Organization (BIO), where the organizers asked me to speak about 35 U.S.C. § 101 and patent-eligible subject matter. In preparing my remarks, I had the opportunity to refer back to one of my earliest scholarly pieces—a 2007 article entitled Ants, Elephant Guns, and Statutory Subject Matter, published in the Arizona State Law Journal.¹ It turns out, over the past twelve years, the only thing that has substantially changed in that time is how I refer to the issue, now preferring “patent-eligible subject matter” to “statutory subject matter.” However, there are some recent and coming changes to patent eligibility; in this essay, I will explain how some of these new changes finally move forward the proposals I made in 2007.

RECKONING WITH STRUCTURAL RACISM: 
A RESTORATIVE JURISPRUDENCE OF EQUAL PROTECTION

Doron Samuel-Siegel, a Kenneth S. Anderson, b and Emily Lopynski c

1 In doing this work, we strive to be mindful of how our own identities and biases (implicit and explicit) might affect our work as scholars. We are one black man—a student—and two white women—one student and one professor. We have striven to speak from our own experience and study, respect the experiences of others, and recognize our own limitations. We hope our readers—both those who are persuaded by our work and those who are skeptical of it—feel respected and will consider sharing their feedback so we may continue our individual and collective learning processes. Our intended audience includes jurists of the present and future, fellow scholars, as well as students and others who may be less familiar with the literature. Because of our broad vision of audience, we have departed in modest ways from law review convention, mostly by providing certain background information that might be nonessential to fellow scholars and learned jurists. We would also like to extend gratitude to our colleagues, teachers, and friends who read previous drafts and provided invaluable feedback and encouragement: Jud Campbell; Henry L. Chambers, Jr.; Erin R. Collins; Jessica Erickson; Ann C. Hodges; Janet D. Hutchinson; Jonathan K. Stubbs; Rachel Julias Suddarth; and Laura A. Webb.

a Doron Samuel-Siegel is a Professor of Law, Legal Practice, at the University of Richmond School of Law. I offer immense thanks to my coauthors, Emily and Ken—your trust, vision, and generosity honor and inspire me. To my parents, Phil and Shosh Samuel-Siegel, thank you for your loving wisdom and for teaching me by example what it means to be forever learning. And, to my wife and partner-in-all-things, Angela M. Davis, you never falter; I appreciate you beyond expression.

b Ken Anderson is a J.D. Candidate in the Class of 2020 at the University of Richmond School of Law. He graduated from the University of Richmond with a B.A. in Leadership Studies and American Studies where he published research on the socio-racial structures of the African American middle class in the Upper South from Reconstruction until the Civil Rights Movement.

c Emily Lopynski is a J.D. Candidate in the Class of 2020 at the University of Richmond School of Law. She graduated from the College of William & Mary, where she studied the role of race and class in historical and present-day inequality. Prior to law school, she served as a Border Fellow in El Paso, Texas, where she founded an immigration legal assistance program, and designed and implemented community outreach programming.
The Economic Efficiency Case
Against Business Tax Privacy

Daniel Schaffa*

By statute, business tax returns are not publicly available. But with public access, investors would acquire useful information that would help them make better investing decisions; business tax compliance and planning would become more uniform, preventing tax-savvy firms from gaining an advantage over other relatively more productive firms; and businesses could learn from one another, which would spare firms the cost of redundantly developing the same tax strategies. In the long run, these efficiency gains could result in lower prices, higher wages, more innovation, more leisure, and better investment returns. In the debate over business tax privacy, these sorts of economic efficiency arguments have received surprisingly little attention. This Article argues that economic efficiency is central to the debate and may well change where we come out on business tax privacy.

* Assistant Professor of Law, University of Richmond. I thank Jim Hines and JJ Prescott for guidance and advice; Anne Choike, Chris Cotropia, Jessica Erickson, Ed Fox, Jim Gibson, Hayes Holderness, Dan Jaqua, Corinna Lain, Andrew Litten, Kyle Logue, Lil Mills, Orli Oren-Kolbinger, Anne Schaffa, Joel Slemrod, and John Vella for useful discussions; seminar participants at the University of Michigan, the University of South Carolina, the University of Miami, the University of Richmond, George Mason University, Washington and Lee University, the NTA 2016 Annual Conference on Taxation, the 2017 Canadian Law and Economics Conference, and the 2017 University of Oxford CBT Doctoral Conference for helpful comments; and Austin Chandler and Kurt Lockwood for excellent research assistance. I gratefully acknowledge support from the NIA training grant to the Population Studies Center at the University of Michigan (T32 AG000221). Any errors are my own.
THE RIPPLE EFFECTS OF GIDEON: RECOGNIZING THE HUMAN RIGHT TO LEGAL COUNSEL IN CIVIL ADVERSARIAL PROCEEDINGS

Jonathan K. Stubbs*

“[L]et justice roll down like waters, and righteousness like an ever-flowing stream.”¹

I. INTRODUCTION

A little over fifty-five years ago, the Supreme Court of the United States decided Gideon v. Wainwright.² The essence of Gideon’s reasoning was that in criminal cases, indigent defendants were entitled to justice. The Gideon Court acknowledged:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.³

The Court recognized that justice—that is, procedural fairness and equal treatment—required due process and equal protection for all. Gideon’s justice rationale includes two interrelated concerns. First, as the Court put it, “fair trials before impartial tribunals”⁴ (that is, procedural fairness or due process). Gideon’s second and related

* © 2020, Jonathan K. Stubbs. All rights reserved. Professor of Law, University of Richmond School of Law. M.T.S., Harvard University, 1990; L.L.M., Harvard University, 1979; J.D., Yale University, 1978; B.A., Oxford University, 1976; B.A., Haverford College, 1974.
3. Id. at 344 (emphasis added).
4. Id.
THE LAW OF HIGH-WEALTH EXCEPTIONALISM

Allison Anna Tait

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2021 FEDERAL CLERKSHIPS: CAN ORDER EMERGE FROM CHAOS?

CARL TOBIAS*

This is a perfect juncture for analyzing 2021 federal judicial clerkships. Many aspirants recently finished half of their legal education. Six appeals courts’ members have agreed to honor a new Federal Law Clerk Hiring Plan (hereinafter referred to as “the pilot”) that is currently in its second year. The pilot directly proscribes seeking and permitting clerkship applications and recommendation letters until June 15, 2020 and prohibits student clerkship interviews and judicial offers before June 16, 2020.¹ However, certain judges within these six tribunals will not respect the pilot during its second year, even though jurists in the seven remaining courts of appeals might follow the new plan. The Administrative Office of the United States Courts (“AO”) extended 2L students OSCAR access in February while suspending in January 2014 the 2003 clerk hiring plan—whereby 3L employment began near Labor Day—and judges will soon consider aspirants. Clues offered below may assist prospects in securing the coveted positions which start in 2021.

* Williams Chair in Law, University of Richmond School of Law. This piece is for David Lat whose perceptive insights on federal law clerk employment and so much else in law and life inspire all people who know his work and David. I wish to thank Margaret Sanner for valuable suggestions, Jamie Wood, Jane Baber and Emily Benedict for valuable research and careful editing, the University of Richmond Law Library staff for valuable research, the Southern California Law Review Postscript editors for excellent editing and sound advice, Ashley Griffin Hudak and Leslee Stone for excellent processing as well as Russell Williams and the Hunton Andrews Kurth Summer Research Endowment Fund for generous, continuing support. Numerous federal appellate and district court judges, law clerks and additional court personnel, law professors, Career Development Office (CDO) professionals and law students afforded many ideas examined below. Remaining errors are mine alone.

The Federal Law Clerk Hiring Pilot and the Coronavirus Pandemic

Carl Tobias*

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Filling The California Federal District Court Vacancies

Carl Tobias*

INTRODUCTION

President Donald Trump frequently argues that confirming federal appellate judges constitutes his quintessential success. The President and the Republican Senate majority have dramatically eclipsed appeals court records by appointing fifty-one conservative, young, and capable appellate court nominees, which leaves merely one vacancy across the country. Nonetheless, these...
INTRODUCTION

President Donald Trump’s major success has been confirming judges for the thirteen federal appellate courts. The President shattered records by appointing a dozen circuit jurists in his administration’s first year, eighteen judges over the course of 2018, and twenty additional judges throughout his third year. Indeed, by June 2019, the appeals courts experienced four vacancies in 179 judgeships and today, only one position remains empty. This achievement is critical, as these tribunals are the courts of last resort for nearly every appeal, and ap-
SPEAKING THE TRUTH: SUPPORTING AUTHENTIC ADVOCACY WITH PROFESSIONAL IDENTITY FORMATION

Laura A. Webb*

When law students are asked to articulate legal rules in a persuasive communication such as a brief, they may experience internal tension. Their version of the rule, as framed to benefit a particular client’s position, may be different from the way they would articulate the rule if they were not taking on an advocate’s role. The conflict between those two versions of a legal rule leads some students to wonder if advocacy itself is deceptive, if an advocate’s role requires one to sacrifice ethics for success, and if ancient Greek philosophers were correct when they derided persuasive communication as “trickery and magic,” and criticized advocates for making arguments that were “artfully written but not truthfully meant.” This tension is not unique to students. All advocates must ask themselves whether they can provide a true and accurate version of the law (truthful law) and simultaneously articulate a version of the law that will help their clients. This question speaks to the very nature of law and what it means to be a lawyer. If the question is not successfully resolved, students and lawyers are more susceptible to the cynicism and discontent that permeates the legal profession.

Using Plato’s denunciation of rhetoric and rhetoricians as a starting point, Part I of this Article will explore how the first year of law school may create and exacerbate tension between law students’ desire to advocate on behalf of their clients and their desire to truthfully communicate the law. Part II will explore how law school could resolve this tension with an explicit discussion of legal determinacy and the lawyer’s role in creating law: what students need to hear, when they need to hear it, and where that conversation might be placed within the curriculum. This Article will identify the developing area of professional identity formation as a natural location for an effective discussion, which would ideally occur within the first year of studies. In that discussion, law students can ex-

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